

REMARKS

In response to the Non-Final Office Action dated November 2, 2007, Applicant respectfully requests reconsideration of the claims in view of the following arguments.

I. Claim Rejection under 35 USC §102(b)

The Examiner raised an issue of public use or on sale activity on page 2 of the Office Action:

An issue of public use or on sale activity has been raised in this application. In order for the examiner to properly consider patentability of the claimed invention under 35 U.S.C. 102(b), additional information regarding this issue is required as follows.

The prior art establish that the invention has been in public use more than one year prior to the filing date of the application.

Additionally, the Examiner cited to Reid (San Diego Union-Tribune, 08/25/2002) (hereinafter “Reid”), “New & Exciting Adventure” CVAC advertisement (hereinafter “CVAC ad”), “Testimonials CVAC Systems Website” (hereinafter, “CVAC testimonials”), and “Introducing the CVAC Process” (hereinafter “CVAC Process”) in support of the alleged prior use or on-sale activity of the invention.

The Examiner then requested further information:

The features that are not specifically disclosed are in regards to the purpose of the on-board interface, a user sensor, a master controller, and specifically the methods of using the pressure vessel, including the accessing of stored data. Information regarding these recited features of the claims and the method of use of the CVAC system, in claims 1-39, up to and including once year prior to the filing date of the present application are required for the examiner to properly consider patentability of the claimed invention under 35 U.S.C. 102(b).

Applicant respectfully disagrees with the Examiner’s statements regarding the alleged prior art and disagrees that the “prior art establish that the invention has been in public use more than one year prior to the filing date of the application.” The invention, including all claimed elements, must have been on-sale or in public use more than one year prior to the filing of the patent application to invoke a statutory bar under 102(b). Thus, where the public use or sale is of a method, device, etc. that does not meet each and every element as claimed in the patent application, there is no statutory bar under §102(b). *See* MPEP § 2133.03(c). As discussed below, the invention as described and claimed in the present application is not the subject of the aforementioned documents cited by the Examiner. Thus, Reid, CVAC ad, CVAC

testimonials, and CVAC process do not evidence a public use or on-sale activity of the invention, as described and claimed, more than one year prior to the filing date of the present application.

The Examiner requested information regarding the purpose of the on-board interface in the device alleged to be in use prior to 2002 by the examiner, and as allegedly evidenced by the cited publications. Applicant responds that the device alleged to be in use prior to 2002 did contain a mouse that allowed a user to stop the pressure vessel unit. Although Applicant does not agree with the Examiner's statement on pages 2-3 of the Office Action that "it is inherent of pressure vessels to include pressure transducers for monitoring air pressure inside the vessel, blowers for removing air from the pressure vessels and valves for controlling air entering the pressure vessels to control pressure levels," the device alleged to be in use prior to 2002 further contained a pressure transducer, a blower, and a valve for controlling air entering the pressure vessel. However, the device alleged to be in use prior to 2002 did not contain certain features currently described and claimed in the present application and discussed below.

In response to the Examiner's request for information regarding a user sensor, and in contrast to the Examiner's characterization of the alleged prior art, Applicant respectfully points out that claims 1- 39 all require, *inter alia*, a user sensor. The user sensor, as described and claimed in the present application, was not part of the CVAC system alleged by the examiner to be in public use more than one year prior to the filing of the present application.

Similarly, a master controller as described and claimed in the present application, was not part of the CVAC system also cited by the examiner as allegedly in public use more than one year prior to the filing of the present application. Furthermore, the methods of using the pressure vessel as claimed, including, *inter alia*, accessing stored data, were not performed in public more than one year prior to the filing of the present application.

As best as the request is understood, Applicant respectfully submits this information regarding the features identified by the Examiner on page 3 of the office action as fulfillment of the Examiner's request for information. Applicant further asserts that the references cited by the Examiner fail to evidence a public use or on-sale activity of the claimed invention because the references do not evidence the invention as claimed and discussed above.

II. Claim Rejections under 35 USC §103:

The Examiner has made the following claim rejections:

1. Rejection of claims 1-33 under § 103(a)

Claims 1-33 currently stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over combinations of alleged prior art which include some or all of the archived webpages cited by the Examiner: “CVAC What’s New,” “CVAC FAQ,” “CVAC Background/Development,” “Introducing the CVAC Process,” and “CVAC What is CVAC,” in view of US Patent Application Publication No. 2004/0261796 (“Butler”) and U.S. Patent No. 4,227,524 (“Galerie”).

Applicant respectfully disagrees.

It is unclear, based on the format of the rejection, which references the Examiner is using to reject each of the claims. For example, with respect to claim 1, the Examiner cites “CVAC What’s New” and Butler. It is unclear whether the Examiner is also relying on any of the other cited references to reject claim 1. Furthermore the examiner has rejected claims 2 and 6 but has not referred to any of the cited references as teaching the elements of claims 2 and 6. Thus, Applicant’s response below addresses all rejected claims and the cited references in general.

The Office has the burden of establishing a *prima facie* case of obviousness. *In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984). Furthermore, if an independent claim is non-obvious under 35 U.S.C. § 103(a), then any claim depending therefrom is non-obvious. MPEP § 2143.03; *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). If the Office fails to establish a *prima facie* case of obviousness, the applicant is entitled to a patent. *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998). Here, Applicant asserts that the Examiner has failed to establish a *prima facie* case of obviousness for the following reasons.

A. References that do not qualify as prior art

The Archived Web-pages

The present application was filed on September 11, 2003. The Examiner asserts that the archived web-pages (“CVAC What’s New,” “CVAC FAQ,” “CVAC Background/Development,” and “CVAC What is CVAC”) were published on December 1, 2002, as shown in the Examiner’s Notice of References Cited. The Examiner’s asserted publication date of December 1, 2002 is not more than 1 year before the filing date of the application (September 11, 2003), therefore the publications of the archived web-pages do not constitute a statutory bar under 35 U.S.C. § 102(b). A rejection based on a publication that is not a statutory bar (i.e., less than 1 year prior to the filing date of the present application) may be overcome by a showing that it was published by the applicant or on his/her behalf. MPEP § 715.01(c).

Applicant submits herewith a 37 CFR § 1.132 Declaration by inventor Carl E. Linton demonstrating that the CVAC References dated December 01, 2002 were published on his behalf. Thus, the archived web-pages do not qualify as prior subject matter as they are not by “another” and, therefore cannot be used for an obviousness rejection under 35 U.S.C. § 103(a). Applicant, therefore, respectfully requests reconsideration and withdrawal of the rejections based on the archived web-pages.

The “Butler” Application

Prior subject matter that may be considered in determining the non-obviousness of a patent claim includes prior art under 35 U.S.C. § 102 and admitted prior art. MPEP § 2141.01. The present application was filed on September 11, 2003. The Butler reference claims priority to June 30, 2003 and, thus, is a § 102(a) publication date (i.e., less than a year prior to the effective filing date of the present application), but is not a §102(b) publication date.

A § 102(a) publication can be overcome by a 37 CFR § 1.131 Affidavit or declaration to antedate the reference. *In re Foster*, 243 F.2d 980, 145 USPQ 166 (CCPA 1965); MPEP § 715. Applicant submits herewith a 37 CFR § 1.131 Declaration by inventor Carl E. Linton demonstrating that the invention as disclosed and claimed in the present application was conceived of at least as early as December 1, 2002, and was coupled with diligence to the subsequent filing of the present application. Such prior conception is evidenced by the Examiner’s own citation of “CVAC What’s New” and “CVAC What is CVAC,” both of which are of record and have apparent publication and archival dates of December 1, 2002. Thus according to the Examiner’s reasoning, the claimed invention was allegedly evidenced by the aforementioned publications, all of which predate the filing date of Butler. Therefore, Applicant respectfully asserts that the claimed invention was conceived of prior to the June 30, 2003 date of the Butler application and coupled with diligence to the filing of the present application, and requests reconsideration and withdrawal of the rejections based on Butler.

B. Remaining references

As discussed above, Applicant asserts that the archived web-pages and the Butler patent application do not qualify as prior art for a §103(a) rejection, and thus may not be used to establish a *prima facie* case of obviousness by the examiner. Below, Applicant further address the Examiner’s rejection based on the following references:

1. The “Introducing the CVAC Process” publication
2. Galerne, U.S. Patent No. 4,227,524

The Office has the burden of establishing a *prima facie* case of obviousness in order to issue an obviousness rejection, *In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984), and all of the claim limitations must be taught by the prior art. *In re Royka*, 490 F.2d at 984-85. MPEP § 2143.03. MPEP § 2142.

Claims 1, 3, 10, and 24 require a pressure vessel and, *inter alia*, a user sensor capable of measuring one or more parameters of a user's body condition.

Claims 34 and 35 require a method using a pressure vessel and, *inter alia*, using a user sensor to measure at least one parameter of a user's body condition.

The “Introducing the CVAC Process” publication

The “Introducing the CVAC Process” publication defines the acronym of “CVAC” as “cyclic variations in altitude conditioning” and explains CVAC in limited and simple terms as using “dynamic changes in air pressure.” The “Introducing the CVAC Process” publication does not disclose the invention as described and claimed in the present application. For example, it does not disclose anything regarding the composition of the pressure vessel, such as a user sensor, an on-board interface, an external controller, a kiosk controller, or a master controller. Nor does it describe the methods of use including, *inter alia*, the accessing of data. Thus, “Introducing the CVAC Process” does not disclose the invention as claimed, by itself or in combination with Galerne as discussed below.

The “Galerne” Patent

Applicant asserts that “Galerne” fails to supplement the above described deficiencies of the “Introduction to CVAC” publication, either alone or in combination. The Examiner stated on page 4 of the Office Action that Galerne “discloses a pressure vessel unit wherein a plurality of controls for controlling breathing, oxygen, and compression are located both inside and outside of the vessel.” The Examiner then further stated on page 5 that “[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to include a user sensor capable of measuring one or more parameters of a user’s body condition, thereby monitoring and ensuring the user’s safety throughout the session.”

Applicant respectfully disagrees.

The invention described by the present application is a hypobaric pressure vessel system that cyclically varies the air pressure within the vessel to simulate the lack of air pressure, e.g., found at different altitudes in the environment. Various air pressures may be applied for various lengths of time

throughout the treatment session, such that the user is subjected to various levels of air pressure and gas concentrations that correspond to the lower pressures and gas concentrations found at higher altitudes.

In contrast, Galerne is concerned with a hyperbaric chamber that maintains constant air pressure to simulate the increased pressure found below the surface of a body of water (increased air pressure). Galerne is concerned with the treatment of nitrogen sickness in divers, etc.

Galerne merely monitors vital statistics of a subject within the static hyperbaric chamber and monitors the gas pressure within the chamber to ensure it remains constant. (see col. 7, lines 45 -60). Galerne does not disclose cyclic variations in altitude conditioning programs to vary the pressure of the chamber and a sensor that monitors the subject within the chamber.

The “Introducing the CVAC Process” publication and Galerne fail to teach each and every element of the independent claims, alone or in combination. The Examiner has, therefore, failed to establish a *prima facie* case of obviousness based on these references.

Thus, Applicant asserts that the Examiner’s rejections of claims 1, 2 and 6, 3-5 and 7-9, 10, 11-14, 15-20, 21 and 22, 23, 24, 25, 26, 27 and 28, 29, 30, 31-33, and 34-39 based on the archived web-pages cannot support a *prima facie* case of obviousness and the additionally cited references, discussed above, do not render the claims obvious.

Furthermore, Applicant respectfully disagrees with the Examiner’s assertion on pages 9-10 of the Office Action that “it is well known in the art to provide users of a service the ability to determine and ensure that the service is safe for the user before the user uses the provided service.” The Examiner has presented no evidence to support such a statement, nor does such a statement provide any ability for the Examiner to establish a *prima facie* case of obviousness.

Official notice

The Examiner indicated, on pages 8-9, that he was taking official notice “that it is well known in the art to use online database with a plurality of client computers accessing the online database,” and that “it is well known in the art to provide payment methods to a system through a controlling kiosk or on the system/apparatus itself, through bill receptors, change receptors, magnetic strips, smart cards, radio frequency, keypad entry of identification, keypad entry of credit information, etc.” The Examiner then relied on such official notice for support of the obviousness rejection of the claims 23 and 24.

Applicant respectfully disagrees with the Examiner’s Official Notice.

It is not appropriate to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. For example, assertions of technical facts in the areas of esoteric technology or specific knowledge of the prior art must always be supported by citation to some reference work recognized as standard in the pertinent art. MPEP § 2144.03; *In re Ahlert*, 424 F.2d at 1091, 165 USPQ at 420-21. See also *In re Grose*, 592 F.2d 1161, 1167-68, 201 USPQ 57, 63 (CCPA 1979) ("[W]hen the PTO seeks to rely upon a chemical theory, in establishing a prima facie case of obviousness, it must provide evidentiary support for the existence and meaning of that theory."); *In re Eynde*, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973) ("[W]e reject the notion that judicial or administrative notice may be taken of the state of the art. The facts constituting the state of the art are normally subject to the possibility of rational disagreement among reasonable men and are not amenable to the taking of such notice.").

In this case, the Examiner has not articulated the pertinent art, nor has the Examiner made any citation to a reference work recognized as standard in the pertinent art.

Thus, Applicant respectfully disagrees with the Examiner's Official Notice and submits that it is inappropriate. The Examiner has not provided objective references to support his assertions. Furthermore, Applicant asserts that claims are not rendered obvious by the cited references, as discussed above, and in view of the Official Notice. The Official Notice, e.g., does not provide the elements missing that are necessary to establish a *prima facie* case of obviousness. Therefore, Applicant respectfully requests reconsideration and withdrawal of the rejection.

2. Rejection of claims 34-39 under 35 U.S.C. § 103(a)

Claims 34-39 currently stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over "Introducing the CVAC Process" in view of U.S. Patent Application Publication No. 2004/0261796 ("Butler").

Applicant respectfully disagrees.

As discussed above, the "Introducing the CVAC Process" publication does not disclose all elements of the claimed invention, and Butler is not available as a reference. Thus, Applicant respectfully requests withdrawal of the rejection.

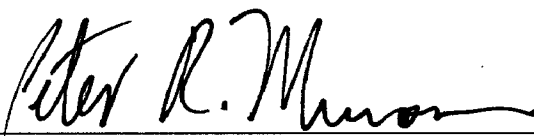
CONCLUSION

Applicant respectfully requests prompt and favorable action with regard to pending claims 1-39. Further, if the Examiner believes that a personal communication will expedite the prosecution, the Examiner is invited to telephone the undersigned at (858) 350-2300.

Respectfully submitted,
WILSON SONSINI GOODRICH & ROSATI

Date: March 3, 2008

By:


Peter R. Munson, Reg. No. 43,821

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Linton, Carl Confirmation No. 8998
Serial No.: 10/659,997 Art Unit: 3714
Filed: September 11, 2003 Examiner: Cheung, Victor
For: **METHOD AND APPARATUS FOR CYCLIC VARIATIONS IN ALTITUDE
CONDITIONING**

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

DECLARATION PURSUANT TO 37 CFR §1.132

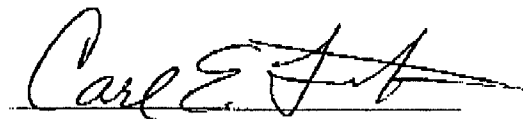
Sir/Madam:

I, Carl E. Linton, do hereby declare as follows:

1. I am the inventor of the subject patent application (Linton) identified above.
2. I am aware of the rejection of the claims in the pending office action under 35 USC §103, dated November 2, 2007.
3. I have read the Office Action dated November 2, 2007, and understand that the Examiner has rejected the claims, in part, on certain CVAC archived web-pages that were apparently retrieved through the archive.org website.
4. The CVAC archived web-pages, including "CVAC What's New" (Reference U, page 1 of Examiner's Notice of References Cited), "CVAC FAQ" (Reference X, page 1 of Examiner's Notice of References Cited), "CVAC Background/Development" (Reference W, page 1 of Examiner's Notice of References Cited), and "CVAC What is CVAC" (Reference V, page 1 of Examiner's Notice of References Cited), all dated December 01, 2002 were published on my behalf.

5. I declare further that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that making of willful false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful statements may jeopardize the validity of the applications or any patent issuing thereon.

Dated: March 3, 2008

A handwritten signature in black ink, appearing to read "Carl E. Linton", written over a horizontal line.

Carl E. Linton

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Linton, Carl

Confirmation No. 8998

Serial No.: 10/659,997

Art Unit: 3714

Filed: September 11, 2003

Examiner: Cheung, Victor

For: **METHOD AND APPARATUS FOR CYCLIC VARIATIONS IN ALTITUDE
CONDITIONING**

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

DECLARATION PURSUANT TO 37 CFR §1.131

Sir/Madam:

I, Carl E. Linton, do hereby declare as follows:

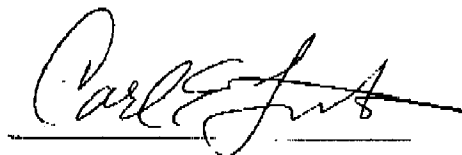
1. I have read the specification of the above-identified application, the pending claims and the Office Action mailed by the USPTO on November 2, 2007.
2. I am the inventor of the subject patent application (Linton) identified above.
3. I understand that the Examiner has rejected the claims as allegedly being obvious in view of several references, one of which is US Patent Application Publication No. 2004/0261796, ("Butler"), which has a priority date of June 30, 2003.
4. The present application was filed on September 11, 2003. Butler, therefore was published less than one year prior to the effective filing date of the present application.
5. I conceived of the invention described and claimed in the present application prior to June 30, 2003, and, coupled with diligence, subsequently filed the present application concerning the devices and methods described and claimed therein.
6. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements are made with knowledge that willful, false statements and the like so made are punishable by fine or imprisonment, or both, under Section § 1001 of Title XVIII of the United

32724-703 201 Declaration CFR 1.131_(PALIB1_3300990_1)-1-

States Code and that willful, false statements may jeopardize the validity of this Application for Patent or any patent issuing thereon.

Respectfully submitted,

Dated: March 3, 2008

A handwritten signature in black ink, appearing to read "Carl E. Linton", written over a horizontal line.

Carl E. Linton